



**NEVADA COMMISSION ON ETHICS
EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION
REGARDING JUST AND SUFFICIENT CAUSE**

REQUEST FOR OPINION NO. 03-40

SUBJECT: MICHAEL MACK
CITY COUNCILMAN
CITY OF LAS VEGAS

A. REPORT OF INVESTIGATION:

DOCUMENTS REVIEWED BY EXECUTIVE DIRECTOR:

- Request for Opinion initiated by the NCOE on its own motion.
- Subject's response received September 24, 2003 via facsimile. (Tab B)
- Confidential NCOE transcript, January 16, 2003. (Attachment 1)
- NCOE Opinion No. 99-56 - Woodbury opinion. (Attachment 2)
- Personal interview with John Redline, Deputy City Attorney, City of Las Vegas on September 30, 2003.

B. RECOMMENDATIONS:

Based on investigative activities, the Executive Director recommends that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to render an opinion in this matter relating to the provisions of:

NRS 281.501(4)

Based on the subject's response which prompted the Executive Director to investigate relevant issues and facts beyond those presented in the complaint in determining this written recommendation pursuant to NAC 281.189, the Executive Director recommends

that the Panel find that just and sufficient cause **DOES EXIST** for the Commission to render an opinion in this matter relating to the provisions of:

NRS 281.501(2)

SPECIFIC REASON(S):

Sufficient credible evidence exists to support a finding of just and sufficient cause for the Commission to hear the matter and render an opinion on whether the subject of the complaint violated the provisions of NRS 281.501(2).

SUMMARY OF REQUEST FOR OPINION

The request for opinion, initiated by the Commission on its own motion pursuant to NRS 281.511(2)(c) and NAC 281.187, alleges a violation of NRS 281.501(4) by Las Vegas City Councilman Michael Mack for failing to make a full and proper disclosure concerning a person, Eric Goodman, to whom he may have a commitment in a private capacity prior to abstaining from a vote at the Las Vegas City Council meeting on August 6, 2003.

SUMMARY OF SUBJECT'S RESPONSE

In his response, Councilman Mack provides a copy of the transcript of the August 6, 2003 Las Vegas City Council meeting and his disclosure regarding his relationship with Eric Goodman. Mr. Mack's private attorney provides a detailed argument as to the adequacy of Mr. Mack's disclosure, and argues that legislative intent from 1999 clearly "lessened the disclosure requirements, especially when a public official abstains from voting."

RELEVANT STATUTES

Relevant statutes to the investigation include NRS 281.501(2), 281.501(4), and 281.501(8):

"NRS 281.501:

2. Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

- (a) His acceptance of a gift or loan;
- (b) His pecuniary interest; or
- (c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other

persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

.....

4. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

- (a) Regarding which he has accepted a gift or loan;
- (b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or
- (c) In which he has a pecuniary interest, without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 in a timely manner.

Formerly NRS 281.501(3) – as referenced in the Woodbury Opinion.

.....

8. As used in this section, “commitment in a private capacity to the interests of others” means a commitment to a person:

- (a) Who is a member of his household;
- (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
- (c) Who employs him or a member of his household;
- (d) With whom he has a substantial and continuing business relationship; or
- (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.”

RESULTS OF INVESTIGATION

Councilman Mack is a public officer as defined by NRS 281.005 and NRS 281.4365. As such, the Commission has jurisdiction over this complaint.

This Commission initiated the complaint based on numerous media reports that indicated Mr. Mack may have violated a confidential advisory opinion rendered by the Commission in January, 2003.

NRS 281.511(5) provides:

“5. Each request for an opinion that a public officer or employee submits to the Commission pursuant to subsection 1, *each opinion rendered by the Commission in response to such a request and any motion, determination, evidence or record of a hearing*

relating to such a request are confidential unless the public officer or employee who requested the opinion:

(a) Acts in contravention of the opinion, in which case the Commission may disclose the request for the opinion, the contents of the opinion and any motion, evidence or record of a hearing related thereto;

(b) Discloses the request for the opinion, the contents of the opinion, or any motion, evidence or record of a hearing related thereto; or

(c) Requests the Commission to disclose the request for the opinion, the contents of the opinion, or any motion, evidence or record of a hearing related thereto.”

The Commission has no authority to ‘investigate’ a violation of NRS 281.511(5)(a) or any other provision of the Ethics in Government Law without the existence of an ethics complaint. Therefore, based upon published information which could reasonably be evidenced by the transcript of a public meeting, the Commission initiated the complaint to determine the substance of and circumstances surrounding Mr. Mack’s disclosure on August 6, 2003.

The Executive Director reviewed the transcript and information supplied by Councilman Mack. As quoted from the transcript, Councilman Mack initially disclosed under the provisions of NRS 281.501(2), with the intent to vote on agenda items 120 and 121. Councilman Mack said, “...I need to make a quick a disclosure that Mr. Eric Goodman here, in front of us today, is, also does some legal work for a personal venture that I’m involved with. So, I just need to disclose that for the record. I don’t believe it’ll have any effect on my voting ability here today.”

Councilman Mack then had no further participation in the agenda items until the end of the discussion, at which time he stated, “Our City Attorney has mentioned that it’s probably prudent for me to abstain, even though I feel I could be – subjective of mind. But I will abstain, since Mr. Goodman is representing me on a separate matter.”

On January 16, 2003, during the hearing before the Commission on Councilman Mack’s confidential advisory opinion request (Opinion No. 02-22), Councilman Mack stated, “Really the reason for coming forward is I clearly understand the role of disclosure and abstention on items that are relating to businesses that I have contractual agreements with or any financial relationship with.” (See confidential transcript at page 6, lines 2-6.)

Later, Chairman Russell asked, “So you have basically heard the questions and statements in regards to what we commonly refer to as the Woodbury Decision, and I believe you have indicated that you understand the specific aspects in regards to any financial interest that you may have in regards to contracts, that you realize that you would have to abstain – excuse me – you would have to disclose and possibly abstain with regards to those; is that correct?” Councilman Mack responded, “Yes, sir.” (See confidential transcript at page 7, lines 17 – 25, and page 8, line 1.)

And, Commissioner Hsu said, in part, “...The other part of the Woodbury decision is they talk about full disclosure. So what I contemplate in your scenario with [Private Business A], for

example, you just say I need to disclose this, [Private Business A] is one member of [several] members of [Enterprise A], and also one of those members of [Enterprise A] is [Private Business B], and I have a 50 percent revenue interest in [Private Business C].... and it doesn't affect me personally, but I just need to disclose it for the record and you go on. The better the disclosure, the less, in my mind, would be the less under attack you would be because you are telling them, look, as you go along this whole road here, it's so far removed by virtue of how you have disclosed it that they are not going to really care. And I think that that would be the cautious approach is when you disclose, you disclose fully that whole nature and series of transactions so it is really clear to the public that this is completely removed, but out of caution you are doing it." (See confidential transcript at page 19, line 14, through page 20, line 12.)

Further, in NCOE Opinion No. 02-22, the Commission expressly advised Councilman Mack, "Public officers should also be mindful of the provisions of NRS 281.501 requiring them to adequately disclose private interests and commitments when considering matters before them and, as appropriate, refrain from advocating the passage or failure of matters and abstain from voting when their independence of judgment is materially affected by their personal interest.... The Commission interpreted the disclosure, participation and abstention standards of NRS 281.501 in its Opinion No. 99-56, *In the Matter of the Opinion Request of Bruce L. Woodbury*, and refers Public Officer to that Opinion for guidance. The Commission cautions Public Officer that when a matter comes before him in his capacity as a Las Vegas City Councilman, he must carefully consider private commitments, pecuniary interests, and gifts and/or loans that may affect his decision in the matter and disclose sufficient information about them to inform the public and his constituents of the potential effect of his action [as required by NRS 281.501(3)]. After making such proper disclosure, Public Officer must then determine whether the independence of judgment of a reasonable person in his situation would, under the circumstances presented in the particular matter, be **materially** affected by his pecuniary interests, commitments, and/or gifts and loans and, if so, he must also refrain from advocating the passage or failure of the matter and abstain from voting upon the matter [as required by NRS 281.501(2)]."

Though the confidential advisory opinion (No. 02-22) was rendered on facts and circumstances related to a separate issue, both Mack's testimony at the hearing and the opinion rendered by the Commission emphasize the importance of the full disclosure standards of NRS 281.501 as interpreted by the Commission in the Woodbury opinion. Councilman Mack indicates he clearly understands the disclosure requirements of NRS 281.501 as interpreted in the Commission's Woodbury opinion.

Councilman Mack's attorney argues that only 'sufficient' information is required to support an abstention. However, the results of the investigation have shown that at the time Councilman Mack made his disclosure, he did so with the intent of participating in the vote – not abstaining from the vote. As such, the Executive Director believes that under the standards of NRS 281.501(2) and the Woodbury opinion, Councilman Mack's disclosure should have included sufficient information concerning his interests and commitments to inform the public of the potential effect of his action in either abstaining or participating, based on whether the

independence of judgment of a reasonable person in his situation would be materially affected by those interests and commitments. Clearly, Councilman Mack felt the nature of the lawyer/client relationship rose to a certain threshold such that there could be at least an appearance of a conflict, if not an actual conflict. Though other statutes grant confidentiality to lawyer/client relationships, Councilman Mack decided to disclose the existence of the professional relationship. Therefore, by deciding to disclose the relationship Councilman Mack should have, at a minimum, provided sufficient information to inform the public of why he felt the independence of judgment of a reasonable person in his situation could be materially affected in this particular circumstance. His disclosure did not clearly indicate how the statutory provisions of NRS 281.501(2) or 281.501(4) would be triggered by:

- (a) His acceptance of a gift or loan;
- (b) His pecuniary interest; or
- (c) His commitment in a private capacity to the interests of others.

Therefore, the disclosure was not sufficient to make a determination regarding the statutory presumptions of NRS 281.501(2) that, "It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group." Further, the disclosure did not, in fact, provide sufficient information for the public to draw a conclusion regarding the resulting benefit or detriment accruing to Councilman Mack or to the other persons whose interests to which Councilman Mack is committed in a private capacity – and thus the public could not readily conclude such benefit or detriment was not greater than that accruing to any other member of the general business, profession, occupation or group. Therefore, the public has little basis to establish a comfort level in knowing whether Mr. Mack's objectivity would or would not be compromised.

According to the City Attorney's office, Councilman Mack did not consult with the City Attorney in advance of this item appearing on the August 6, 2003 agenda. After consulting with a city attorney during the meeting, Councilman Mack decided to abstain from the vote -- an action which denied his constituents a voice in the matter pending before the City Council -- without clarifying with specificity the nature of his private commitments necessitating his abstention.

Therefore, the Executive Director recommends that the panel find no just and sufficient cause that Councilman Mack violated the provisions of NRS 281.501(4). However, the Executive Director does recommend that the panel find just and sufficient cause for the Commission to hear the matter and render an opinion on whether Councilman Mack violated the provisions of NRS 281.501(2).

CONCLUSION

The Executive Director hereby recommends that the panel find just and sufficient cause for the Commission to hold a hearing and render an opinion on whether Councilman Mack violated the provisions of NRS 281.501(2).

DATED: _____ *October 8, 2003* _____

_____ *Stacy M. Jennings* _____
EXECUTIVE DIRECTOR